SIME UEP PROPERTIES BHD

v.

WOON NYOKE LIN

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ABDUL HAMID MOHAMAD JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-02-689-1998]
22 JULY 2002

CONTRACT: *Formation - Terms and conditions - Plaintiff made booking to rent kiosk at premises owned by defendant - Deposit paid - Booking form stipulated that booking was subject to defendant's confirmation within 14 days - Defendant failed to confirm and return deposit within 14 days but subsequently requested for a negotiation to relocate kiosk - Whether there was a contract between the parties - Whether plaintiff's booking was an offer subject to an acceptance by defendant - Whether there was clear evidence of acceptance by defendant*

DAMAGES: *Claim for damages - Breach of contract - Whether a projection of would be losses was sufficient to establish claim - Whether costs incurred should be itemised - Whether claimant failed to mitigate losses*

The respondent ('plaintiff') made an application in a booking form to rent Kiosk No. 3 for the purpose of selling doughnuts at the premises known as Subang Parade owned by the appellant ('defendant'). The plaintiff paid a deposit of RM500. The booking form stated that the booking for the kiosk was subject to the defendant's reply confirmation within 14 days thereof. The defendant's agent, Collings Hui Sdn Bhd ('Collings Hui') handled the bookings for the various outlets at the Subang Parade. At that time, the plaintiff was Collings Hui's administrative manager. The defendant terminated the services of Collings Hui after the appointment of Natvest Sdn Bhd ('Natvest') as its new agent. The plaintiff raised the matter of the kiosk with Natvest and Natvest requested the plaintiff to negotiate for a relocation of the kiosk as the location requested for would impede the flow of human traffic. The plaintiff, however, refused to negotiate and sent a tenancy agreement in respect of the kiosk to Natvest for execution with a cheque of RM500 for rent. Natvest returned the said agreement with a cheque for RM1,000, being the deposit and the rental, to the plaintiff. This led to the plaintiff commencing an action at the High Court for damages for breach of contract. The learned judge primarily relied on the words "subject to your reply confirmation within 14

days hereof" found in the application and held that as the defendant failed to reply and return the deposit within 14 days as stipulated, the defendant was deemed to have accepted the application. Accordingly, it was held that there was a contract between the parties and damages should be granted. Hence, the defendant's appeal.

Held:
Per Mokhtar Sidin JCA

[1] The advertisement by Collings Hui, upon which the plaintiff made an offer to rent Kiosk No. 3, was nothing more than an invitation to treat. Also, the plaintiff's application was nothing more than an offer by the plaintiff subject to an acceptance by the defendant or its agent. There was no evidence to show that the defendant or their agent accepted the offer by the plaintiff. On this basis alone, there was no contract whatsoever. (p 731 h)

[2] The words "… subject to your reply confirmation within 14 days hereof" found in the application were meaningless in view of the principle laid down in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & 2 Ors*. Those words would be meaningful if the appellant or its agent accepted the offer outside the 14 days and the respondent was not interested to rent Kiosk No. 3. They were nothing more than a condition imposed by the respondent in case the appellant accepted the offer by the respondent. The learned judge had misconstrued those words. (p 731 i & 732 a-b)

[3] There was no written acceptance by the defendant or its agent. The evidence showed that the defendant from the very beginning had no knowledge of the application at all. The plaintiff submitted the application to Collings Hui. The evidence showed that Collings Hui kept the application from the time the application was received. There was no evidence to show that Collings Hui had ever informed or shown the application to the defendant. (p 732 c)

[4] As the plaintiff blamed Natvest for refusing to accept her offer, the conduct of Natvest should be considered. Natvest was appointed just before the services of Collings Hui were terminated by the defendant. Collings Hui admitted that the plaintiff's application and other documents were handed over to Natvest just before the termination of its agency. As soon as Natvest received the application, the plaintiff was invited to come over to the office of Natvest in order to discuss that application. It was clear that Natvest had not shown any conduct that it had accepted the plaintiff's offer in respect of Kiosk No. 3. On the contrary, there was clear evidence to show that Kiosk No. 3 could not be rented out to the plaintiff because it had to be dismantled and therefore non-existent. (p 732 e-h)

[5] Collings Hui kept the plaintiff's application for about a year without doing anything about it. Collings Hui could easily have issued an acceptance letter. There was nothing to show that Collings Hui accepted the offer by the plaintiff. Further, being in the employment of Collings Hui, the plaintiff could have easily raised the matter of her application with Collings Hui. The plaintiff only raised the issue of her application as soon as Natvest was appointed as agent for the defendant in place of Collings Hui. Collings Hui's termination must have had something to do with the plaintiff raising the issue. (p 732 h & 733 b)

[6] The evidence showed that the plaintiff had no experience whatsoever in the business of making and selling doughnuts. In order to show that she had suffered damages, the plaintiff only presented a projection of sale of doughnuts at Subang Parade. Further, the projection presented was unreliable and unsatisfactory to show the damages (the would-be profit) the plaintiff would have suffered. Also, a projection is not sufficient to establish the would-be losses of profit. A venture into a business will not necessarily mean that one can make a profit out of it. Not all business end up with a profit. It followed that the plaintiff failed to establish the expected losses as a result of the breach. (pp 739 e, f, g & 740 b-c)

[7] The plaintiff had not itemised the RM5,000 claimed to have been spent on preparatory works to start the business. In a claim such as this, the plaintiff should satisfy the court the actual sums spent for that purpose. Further, the plaintiff knew from the very beginning that she would not be given Kiosk No. 3 as the defendant informed her that it would no longer exist due to the fact that it would impede the flow of human traffic. Also, she had declined the alternative stall that was offered to her. For that reason, it was safe to come to the conclusion that no preparatory works had been done by the plaintiff. It would be foolish for her to have the preparatory works done when there was a strong indication that she would not be allocated Kiosk No. 3. (p 740 d-e)

[8] The plaintiff refused Natvest's offer of an alternative stall. Natvest had no alternative but to offer the alternative stall due to the fact that Kiosk No. 3 was to be dismantled. Therefore, the plaintiff failed to mitigate her losses. (p 740 g)

[Appeal allowed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden ('plaintif') telah membuat satu permohonan dalam borang penempahan untuk menyewa Kiosk No. 3 bagi tujuan menjual donat di premis yang dikenali sebagai Subang Parade yang dimiliki oleh perayu ('defendan'). Plaintif telah membayar deposit sebanyak RM500. Borang penempahan tersebut menyatakan bahawa penempahan kiosk tersebut adalah tertakluk kepada jawapan pengesahan defendan dalam tempoh 14 hari daripadanya. Ejen defendan, Collings Hui Sdn Bhd ('Collings Hui') telah mengendalikan penempahan-penempahan untuk pelbagai kedai di Subang Parade. Pada waktu itu plaintif merupakan pengurus pentadbiran Collings Hui. Defendan telah menamatkan perkhidmatan Collings Hui selepas perlantikan Natvest Sdn Bhd ('Natvest') sebagai ejen barunya. Plaintif telah membangkitkan perkara mengenai kiosk tersebut dengan Natvest dan Natvest meminta plaintif berunding untuk penempatan semula kiosk tersebut kerana lokasi yang diminta akan menjejaskan pergerakan pengunjung (human traffic). Plaintif, walaubagaimana pun, enggan untuk berunding dan telah mengirimkan satu perjanjian penyewaan berhubung kiosk tersebut kepada Natvest untuk penyempurnaan bersama-sama dengan satu cek bagi nilai RM500 untuk penyewaan. Natvest telah mengembalikan perjanjian itu bersama-sama dengan cek bernilai RM1,000, yang merupakan deposit dan sewaan, kepada plaintif. Ini telah menyebabkan plaintif memulakan satu tindakan di Mahkamah Tinggi untuk gantirugi kerana memungkiri kontrak. Hakim yang bijaksana terutamanya bergantung pada perkataan-perkataan "subject to your reply confirmation within 14 days hereof" yang terdapat di dalam permohonan tersebut dan memutuskan bahawa oleh kerana defendan telah gagal memberi jawapan dan mengembalikan deposit tersebut di dalam tempoh 14 hari sepertimana yang ditetapkan, defendan telah dianggap sebagai telah menerima permohonan tersebut. Sehubungan itu, telah diputuskan bahawa terdapat satu kontrak antara pihak-pihak tersebut dan gantirugi haruslah diberikan. Oleh itu, menyebabkan rayuan defendan.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Iklan telah dibuat oleh Collings Hui, di atas yang mana plaintif telah membuat satu tawaran untuk menyewa Kiosk No. 3, adalah tidak lebih daripada satu jemputan untuk berbincang. Juga, permohonan plaintif tidak lebih daripada satu tawaran oleh plaintif tertakluk kepada penerimaan oleh defendan atau ejennya. Tidak terdapat keterangan untuk menunjukkan bahawa defendan atau ejen mereka telah menerima tawaran oleh plaintif. Atas dasar ini sahaja, tidak terdapat apa-apa kontrak sekali pun.

[2] Perkataan-perkataan "… subject to your reply confirmation within 14 days hereof" yang terdapat di dalam permohonan tersebut tidak bermakna memandangkan prinsip yang dibentangkan di dalam *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & 2 Ors.* Perkataan-perkataan tersebut akan mempunyai makna jika perayu atau ejennya menerima tawaran itu di luar tempoh 14 hari dan responden tidak berminat untuk menyewa Kiosk No. 3. Ianya tidak lebih daripada syarat yang dikenakan oleh responden sekiranya perayu menerima tawaran oleh responden. Hakim yang bijaksana telah tersalah tafsir akan perkataan-perkataan itu.

[3] Tidak terdapat penerimaan bertulis oleh defendan atau ejennya. Keterangan tersebut menunjukkan bahawa defendan daripada mula lagi tiada pengetahuan mengenai permohonan tersebut sama sekali. Plaintif telah mengemukakan permohonan tersebut kepada Collings Hui. Keterangan menunjukkan bahawa Collings Hui telah menyimpan permohonan tersebut daripada masa permohonan tersebut diterima. Tidak terdapat keterangan untuk menunjukkan bahawa Collings Hui pernah memaklumkan atau menunjukkan permohonan tersebut kepada defendan.

[4] Oleh kerana plaintif telah mempersalahkan Natvest kerana enggan untuk menerima tawaran beliau, tindakan Natvest haruslah dipertimbangkan. Natvest telah dilantik sejurus sebelum perkhidmatan Collings Hui ditamatkan oleh defendan. Collings Hui mengakui bahawa permohonan plaintif dan dokumen-dokumen lain telah diserahkan kepada Natvest sejurus sebelum penamatan ejensi beliau. Sebaik sahaja Natvest menerima permohonan tersebut, plaintif telah dijemput untuk datang ke pejabat Natvest demi untuk membincangkan permohonan itu. Ianya adalah jelas bahawa Natvest telah tidak menunjukkan sebarang tindakan bahawa ianya telah menerima tawaran plaintif berhubung dengan Kiosk No. 3. Sebaliknya, terdapat keterangan yang nyata untuk menunjukkan bahawa Kiosk No. 3 tidak boleh disewakan kepada plaintif kerana ianya haruslah dibuka/dirobohkan dan dengan itu menjadikannya tidak wujud.

[5] Collings Hui telah menyimpan permohonan plaintif selama lebihkurang satu tahun tanpa melakukan apa-apa terhadapnya. Collings Hui boleh dengan mudahnya mengeluarkan surat penerimaam. Tidak terdapat apa-apa untuk menunjukkan bahawa Collings Hui telah menerima tawaran oleh plaintif. Selanjutnya, oleh kerana bekerja dengan Collings Hui, plaintif boleh dengan mudahnya membangkitkan perkara mengenai permohonan beliau dengan Collings Hui. Plaintif hanya membangkitkan isu mengenai permohonannya sebaik sahaja Natvest dilantik sebagai ejen bagi pihak defendan bagi m,enggantikan Collings Hui. Penamatan Collings Hui semestinya mempunyai kaitan dengan pembangkitan isu tersebut oleh plaintif.

[6] Keterangan menunjukkan bahawa plaintif tidak mempunyai pengalaman apa sekalipun dalam perniagaan membuat dan menjual donat. Demi untuk menunjukkan bahawa beliau telah mengalami gantirugi, plaintif hanya mengemukakan unjuran penjualan donat di Subang Parade. Selanjutnya, unjuran yang dikemukakan adalah tidak boleh diharap dan tidak memuaskan untuk menunjukkan gantirugi (keuntungan yang akan diperolehi) yang plaintif mungkin akan alami. Juga, sesuatu unjuran adalah tidak memadai untuk menentukan kehilangan keuntungan yang akan berlaku. Sesebuah usaha perniagaan tidak semestinya bermakna bahawa seseorang boleh membuat keuntungan daripadanya. Bukan semua perniagaan berakhir dengan keuntungan. Diikuti bahawa plaintif telah gagal untuk menetapkan kerugian yang dijangkakan akibat keingkaran tersebut.

[7] Plaintif telah tidak menurunkan butiran bagi RM5,000 yang dituntut telah dibelanjakan atas kerja-kerja persediaan untuk memulakan perniagaan tersebut. Dalam sesuatu tuntutan seperti ini, plaintif haruslah meyakinkan mahkamah jumlah sebenar yang telah dibelanjakan bagi tujuan itu. Selanjutnya, plaintif mengetahui daripada mula lagi bahawa beliau tidak akan diberikan Kiosk No. 3 kerana defendan telah memaklumkan kepadanya bahawa kiosk tersebut tidak akan wujud lagi disebabkan hakikat bahawa ianya akan menghalang pergerakan orang ramai. Juga, beliau telah menolak gerai alternatif yang telah ditawarkan kepada beliau. Atas alasan itu, adalah selamat untuk mencapai kesimpulan bahawa tiada kerja-kerja persediaan telah dilakukan oleh plaintif. Ianya adalah bodoh bagi beliau untuk melakukan kerja-kerja persediaan sedangkan terdapatnya petanda yang kukuh bahawa beliau tidak akan diperuntukan Kiosk No. 3.

[8] Plaintif telah menolak tawaran Natvest untuk gerai alternatif. Natvest tiada pilihan melainkan untuk menawarkan gerai alternatif disebabkan fakta bahawa Kiosk No. 3 akan dibuka/dirobohkan. Oleh itu, plaintif gagal untuk mengurangkan kerugiannya.

[Rayuan dibenarkan.]

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 ***(dist)***

Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & Ors [2001] 3 CLJ 864 ***(foll)***

Fraser & Neave Ltd v. Yeo Hiap Seng Ltd [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 ***(refd)***

Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd [1995] 3 CLJ 171 ***(refd)***

PT Master Mandiri v. Yamazaki Construction (S) Pte Ltd [2001] 1 SLR 540 ***(refd)***

Straits Engineering Contracting Pte Ltd v. Merteks Pte Ltd [1996] 1 SLR 227 ***(refd)***

For the appellant - Sabarina Jamadi; M/s Zaid Ibrahim & Co
For the respondent - M Menon (Melvin Cheah); M/s Jaffar & Menon

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S5-22-300-1994]

Reported by Usha Thiagarajah

JUDGMENT

Mokhtar Sidin JCA:

Sometime in April 1987 the respondent submitted a booking form dated 3 April 1987 (hereinafter referred to as "the application") to the appellant's agent to rent Kiosk No. 3 at the premises owned by the appellant which premises is known as Subang Parade. The appellant's agent handling the bookings for the various outlets at the Subang Parade at that time was Collings Hui Sdn Bhd. (hereinafter referred to as "Collings Hui"). It is interesting to note and not disputed that the respondent at that time was employed by Collings Hui as its administrative manager. Together with the booking form the respondent also remitted a sum of RM500 said to be the deposit of the said booking. There is no evidence to show that Collings Hui as the booking agent for the appellant replied to the application made by the respondent or for that matter accepted the application made by the respondent. Things were not well between the appellant as the owner of Subang Parade and Collings Hui. Apparently, Collings Hui was not happy with the appointment of Natvest Sdn Bhd (hereinafter referred to as "Natvest") as the appellant's new agent. The appellant then terminated Collings Hui as its agent sometime on 31 March 1988. On the other hand, Collings Hui claimed that it terminated its agency with the appellant on 10 March 1988. For the purposes of this appeal, it does not matter who terminated the services of Collings Hui, but it is to be noted that as on 31 March 1988 Collings Hui officially ceased to be the agent for the appellant. On 5 April 1988, the respondent through her solicitors forwarded three copies of a tenancy agreement in respect of Kiosk No. 3 to Natvest as the agent for the appellant requesting Natvest to execute the said agreement. Together with that agreement the solicitors also enclosed a cheque for RM500 being the rental payment. Natvest or the appellant did not execute the agreement. Apparently, at that point of time, Natvest or the appellant did not accept the respondent's application. Natvest returned the unexecuted agreement and the RM1,000 (deposit and rental) to the respondent's then solicitors, Messrs Chooi & Company.

The respondent then filed the present claim. In her statement of claim the respondent stated, *inter alia*, the following:

3. By an agreement dated 3.4.87 (hereinafter referred to as "the said Agreement") the Plaintiff *inter alia* agreed:

   a) to lease an area of 120 sq. ft. and known as Kiosk 3 at an agreed rental of RM500.00 from the Defendant;

   b) that the commencement of the lease shall begin three (3) months from the date of issuance of Certificate of Fitness for occupation of Subang Jaya Shopping Centre;

   c) that the lease shall be for a period of three (3) years with an option to renew for another three (3) years.

   The full terms and effect of the Agreement dated 3.4.87 shall be referred to at the trial.

4. Pursuant to the said Agreement, the Plaintiff paid a sum of RM500.00 as booking deposit and one (1) month's rental inclusive of service charges.

5. The defendant had pursuant to the said Agreement represented and demarcated the exact location of Kiosk 3 at Subang Jaya Shopping Centre.

6. On or about 5.4.88 the Plaintiff through their solicitors MESSRS CHOOI & CO forwarded a further cheque for RM500.00 being the balance security deposit and 3 copies of the tenancy agreement duly executed to the Defendant.

7. On 7.6.88 the Defendant contrary to the Agreement purported to relocate the position of Kiosk 3 and notified of their intention to rescind the Agreement dated 3.4.87.

8. On or about July, 1988 the defendant returned the Plaintiff's cheques totalling RM1,000.00 and the unexecuted tenancy Agreement wherein the same were thereafter returned to the Defendant.

9. As a result of the Defendant's act and/or omission and breach of the Agreement dated 3.4.87 on 7.6.88, the Plaintiff incurred loss and expenses.

10. The Plaintiff at all material times were desirous of commencing the business of retail of doughnuts, chocolate cookies, delicacies and other food items.

11. The Plaintiff instructed IN DEPTH RESEARCH & MANAGEMENT CONSULTANTS SDN BHD to carry out a survey in January, 1988. The Plaintiff shall rely on the said survey at time of trial.

12. (a) The Plaintiff found that an average of 411 customers visited Kiosk 3 per day and made purchases of five (5) or more doughnuts at a cost of 0.70 sen per doughnut;

(b) The Plaintiff would have made a profit of 0.55 sen per doughnut or RM1,130.25 per day (5 x 0.55 x 411) and therefore RM412,541.25 per year;

(c) For the duration of 3 years of the lease the Plaintiff's loss is estimated at RM1,237,623.75.

13. In anticipation of the commencement of the lease the Plaintiff carried out interviews for prospective employees, prepared signboards and such other preparation work necessary to launch the stall and incurred expenses of RM5,000.00.

In their statement of defence the appellant stated, *inter alia*, the following:

3. Paragraph 3 of the Statement of Claim is denied and the Defendant will say that the Plaintiff has no cause of action.

4. Further, the Defendant will say that the Plaintiff's claim is statute barred. The defendant will rely on Section 6 of the Limitation Act 1953.

5. In the alternative, the Defendant avers that the purported Agreement dated 3rd April 1987 is unenforceable, as the Plaintiff was not registered with the Registrar of Businesses at the material time.

6. Further, and/or in the alternative, save that the sum of RM500.00 was received as a booking fee, paragraphs 4, 5, 6, 7 & 8 are denied and the Defendant will say that there was no Agreement made between the Plaintiff and the Defendant on 3rd April 1987 nor at any time in respect of Kiosk No. 3.

PARTICULARS

a) By a booking form dated 3rd April 1987 the Plaintiff made an offer to take a tenancy at Kiosk No. 3.

b) The Plaintiff was informed that such offer was subject to acceptance by the Defendant;

c) The Plaintiff was also aware that the said offer was also subject to any changes to the layout, size and location of the lettable areas of the shopping complex then known as Subang Jaya Shopping Centre and thereafter known as Subang Parade, by the Architect and/or Developer without prior notice and at their sole discretion;

d) The Plaintiff's said offer was not accepted as it was necessary to relocate Kiosk No. 3 as it's location would impede the flow of human traffic especially in an emergency;

e) The Defendant by its agent Natvest Sdn Bhd had made repeated requests to the Plaintiff to discuss the proposed relocation of Kiosk No. 3 but there was no response from the Plaintiff;

f) The Plaintiff, without the knowledge or consent of the Defendant or its agent obtained photocopies of, and executed the Tenancy Agreement;

g) In the circumstances the Defendant and its agent refused to execute the said Tenancy Agreement and returned the same to Messrs Chooi & Co together with the solicitors cheque No. 619503 for the sum of RM500.00 and also refunded the RM500.00 booking fee.

7. Paragraph 9 of the Statement of Claim is denied and the Plaintiff is put to strict proof thereof.

8. The Defendant has no knowledge of the allegations in paragraphs 10, 11, 12 and 13 of the Statement of Claim and puts the Plaintiff to strict proof thereof.

Apparently, there is no reply by the respondent to the appellant's statement of defence.

From the statement of defence it is clear to us that the appellant denied that there was a contract between the parties in respect of Kiosk No. 3. The evidence shows that when the respondent submitted the application, it was in response to an advertisement by Collings Hui (her employer) in respect of kiosks available at the Subang Parade. As can be seen the advertisement was a general advertisement inviting the public to make an offer to rent the various outlets available at the Subang Parade. In the application the preamble read:

> I/We wish to lease unit No(s) Kiosk 3 Area(s) 120 sq. ft. and I/we agree to your following basic rental terms subject to your reply confirmation within 14 days hereof.

As stated earlier, the application was accompanied by RM500 deposit. This application was submitted to Collings Hui when she was the administrative manager. There is no evidence to show that Collings Hui or the appellant replied to this application. On the other hand, the evidence shows that there was no acceptance by Collings Hui, Natvest or the appellant. It is also to be noted that the application is "subject to contract of the tenancy agreement". Despite this the respondent on 5 April 1988 through her then solicitors, Messrs Chooi & Company, sent the agreement to Natvest for Natvest to execute. She did not do this when her employer (Collings Hui) was the agent for the appellant. There was a time gap of one year from the date when the respondent submitted her application to the time when Messrs Chooi & Company sent the agreement. It was only sent to Natvest a few days after the agency of Collings Hui was terminated. Though the respondent stated that she got a copy of the agreement from other tenants, it is apparent to us that the agreement originated from Collings Hui. The reason for us saying so was that when the

agreement was sent to Natvest on 5 April 1988, it is clear that Natvest had just taken over the agency from Collings Hui whose services was terminated only on 31 March 1988. The letter from the respondent's solicitors enclosing the agreement made it clear that Natvest as the agent of the appellant had no choice but to execute the agreement. The letter also made it clear that failing to do so would render the appellant liable for breach of contract. Natvest, on the other hand, had requested the respondent to come to their office to discuss the matter. Natvest went on to explain that Kiosk No. 3 was to be dismantled because it impeded the pedestrian movements to the exit in case of an emergency and as such it was not available anymore and the respondent was given the opportunity of choosing another kiosk. The respondent knew that Kiosk No. 3 had been dismantled because this fact was mentioned in a subsequent letter by her solicitors. Despite that fact, the respondent refused to meet Natvest officials and insisted that Kiosk No. 3 be reinstated and be given to her. As a result, Natvest returned the RM1,000 (the deposit and the rent) to Messrs Chooi & Company.

On the basis stated above, the issue before us is whether there is a valid contract between the appellant and the respondent in respect of Kiosk No. 3? The respondent claimed that there was already a contract, based on the application form submitted. On the other hand, the appellant claimed that there was no contract. The learned trial judge found in favour of the respondent and held that there was a contract. Being dissatisfied with that decision the appellant appealed against that decision.

In his judgment the learned trial judge held that there was a contract because of the wordings: "... subject to your reply confirmation within 14 days hereof" found in the application. Our understanding of the judgment of the learned judge is that since there was no rejection of the application by the respondent or their agent, the application was deemed to have been accepted by the appellant. This, as the learned judge said, was strengthened by the fact that the respondent's then solicitors sent an agreement already signed by the respondent requesting the appellant or their agent to execute the same and also the fact that a cheque for RM500 said to be the rental payment for the said kiosk was enclosed. With that the learned judge held that the contract between the parties was sealed.

With the greatest respect to the learned judge, the determination whether there is a contract or not in the present appeal is not that simple. In our view, the recent decision of this court in *Eckhardt Marine GMBH v. Sheriff Mahkamah Tinggi Malaya di Seremban & 2 Ors.* [2001] 3 CLJ 864 has a bearing in the present appeal. In that case the first respondent owned a motor vessel known as "Mount 1" and had put the same for sale by advertisement on the terms and conditions stated by the first respondent and on "as is where is" basis.

The appellant had, by a letter addressed to the first respondent, offered to purchase the vessel on the first respondent's terms but subject to his conditions. Firstly, that the port authority did not require any repairs to be done to the vessel and secondly that the vessel could leave on its own power on the basis of a seaworthiness certificate for one ballast voyage to Chittagong issued by an appointed surveyor of the underwriters. The appellant's conditions were met and the sale of the vessel was approved by the judge of the High Court, whereupon the appellant became obliged to pay the balance of the purchase price within the stipulated time, but failed to do so and its deposit thereby forfeited. The appellant applied unsuccessfully to the High Court for the release of its deposit on the ground that no binding contract had been concluded between the parties. In that case Gopal Sri Ram, JCA gave four tests to be adopted by a court in determining whether there is an agreement concluded between the parties. The first guideline is stated at p. 867 where his Lordship stated:

> First, the general approach that is to be adopted by a court in determining whether there is an agreement concluded between the parties is to see whether there is a definite offer made by one party which has been accepted by the other. In other words, whether the agreement in question may be resolved into an offer and a corresponding acceptance. That such an approach should be generally adopted was affirmed by the House of Lords in *Gibson v. Manchester City Council* [1979] 1 All ER 972. ...

At pp. 868 and 869 his Lordship stated:

> Second, there are a number of guidelines – we emphasise that these are only guidelines – that have been formulated by courts to ascertain whether there was an offer in a given case and by whom it was made. Thus, as a general rule, an advertisement is considered by courts to be not an offer but a mere invitation to treat, that is to say, an offer to make offers. *Gibbons v. Proctor* [1891] 64 LT 594 and *Partridge v. Crittenden* [1968] 2 All ER 421 are illustrative of the general rule. The American case of *Lefkowitz v. Great Minneapolis Surplus Store* [1957] 251 Minn 188 provides the contradistinction. In that case, the defendant store published an advertisement that read "Saturday 9 a.m. sharp. 3 brand new fur coats worth to $100. First come first served $1 each." On each of the Saturdays following the publication of the advertisement, the plaintiff was the first to present himself at the appropriate counter in the defendant's store. On each occasion he demanded the coat and indicated his readiness to pay the sale price of $1. On both occasions the defendant refused to sell the merchandise to the plaintiff on the ground that it was a "house rule" that the offer was intended for women only. The Municipal Court of Minneapolis found for the plaintiff. The defendant appealed. The appellate court in dismissing the appeal held that the advertisement constituted an offer that had been accepted by the plaintiff. Murphy J delivered the judgment of the court. He said:

> Whether in any individual instance a newspaper advertisement is an offer rather an invitation to make an offer depends on the legal intention of the parties and the surrounding circumstances. We are of the view on the facts before us that the offer by the defendant on the sale of the Lapin fur was clear, definite, and explicit, and left nothing open for negotiation. The plaintiff having successfully managed to be the first one to appear at the seller's place of business to be served, as requested by the advertisement, and having offered the stated purchase price of the article, he was entitled to performance on the part of the defendant. We think the trial court was correct in holding that there was in the conduct of the parties a sufficient mutuality obligation to constitute a contract of sale.

> Third, an offer may be made unconditionally or upon stated conditions. In the later case, an acceptance to be valid must accord with the terms of the offer. A conditional offer lapses upon the failure of the condition. If authority is required for these rather elementary propositions, it may be found in *Financings Ltd v. Stimson* [1962] 3 All ER 386.

> Fourthly, the act of acceptance may be either by words or by conduct or it may be partly by words and partly by conduct. *Brogden v. Metropolitan Railway Co* [1877] 2 App Cas 666 is a case of acceptance by conduct.

At p. 869 Gopal Sri Ram JCA stated his conclusion:

> In the present instance, there is no doubt that the Sheriff's advertisement amounted to an invitation to treat. It is the appellant who made a conditional offer by way of its letter in question. The Sheriff clearly accepted the appellant's offer. He did so by words and by conduct. He applied to the Judge for leave to sell. He ensured satisfaction of the appellant's conditions by obtaining confirmation from the relevant authority. The learned Judge undertook a careful scrutiny of the evidence and came to the conclusion that there was a valid and binding contract between the parties. We were unable to detect any error in his reasoning and we found no difficulty whatsoever in upholding his judgment.

In the present case, it is clear to us that the respondent did make an offer to rent Kiosk No. 3 based on an advertisement by Collings Hui. The advertisement is nothing more than an invitation to treat as stated by Gopal Sri Ram JCA in the above case. In our view the application (booking form) is nothing more than an offer by the respondent subject to an acceptance by the appellant or their agent. There is no evidence to show that the appellant or their agent accepted the offer by the respondent. On that basis alone, we are of the opinion that there was no contract whatsoever. It is clear from the judgment the learned judge relied too much on the wordings: "... subject to your reply confirmation within 14 days hereof" found in the application. In view of the principle laid out in *Eckhardt Marine GMBH v. Sheriff Mahkamah*

Tinggi Malaya di Seremban & 2 Ors. those words are meaningless. Those words would be meaningful only in the circumstances when the appellant or their agent accepted the offer outside the fourteen days and the respondent is not interested to rent Kiosk No. 3. To us, it is nothing more than a condition imposed by the respondent in case the appellant accepted the offer by the respondent, which is similar to the conditions imposed by the purchasers in the above case. In our view, the learned judge had misconstrued those words.

As we have stated above, there was no written acceptance by the appellant or their agent in the present appeal. The evidence shows that the appellant, from the beginning, has no knowledge of the application at all. The respondent submitted the application to Collings Hui. The evidence shows that Collings Hui kept the application from the time the application was received. There was no evidence to show that Collings Hui have ever informed or shown the application to the appellant. In our view, the appellant did not know about the respondent's application until they were sued in court. As such, no inference could be drawn from the appellant. What about the conduct of the agents? We would consider the conduct of the second agent, Natvest, because it is apparent to us that the respondent blamed Natvest for refusing to accept her offer. The evidence shows that Natvest was appointed just before the services of Collings Hui was terminated by the appellant. Collings Hui admitted that the respondent's application and other documents were handed over to Natvest just before the termination of their agency. As soon as Natvest received the application, the respondent was invited to come over to the office of Natvest in order to discuss that application. It was indicated then that Kiosk No. 3 would be dismantled and the respondent was offered alternative stall. This can be seen in the letter dated 7 June 1988 from Natvest to the respondent's solicitors. The respondent not only refused to see Natvest, but started to pave the way to sue the appellant by sending the agreement through her solicitors for Natvest to sign. This was done on 5 April 1988 which was five days after the appellant terminated the agency of Collings Hui. This matter dragged on until Natvest returned the agreement and RM1,000 as we have narrated earlier. From this evidence, it is clear to us that Natvest had not shown any conduct that they have accepted the respondent's offer in respect of Kiosk No. 3. On the contrary, there is clear evidence to show that Kiosk No. 3 could not be rented out to the respondent because it had to be dismantled and therefore non-existent.

What about the conduct of the first agency of the appellant, Collings Hui, who was the respondent's employer? The evidence shows that Collings Hui kept the application after receiving it from the respondent and handed it over to Natvest after Natvest took over the agency from Collings Hui. The managing director of Collings Hui who gave evidence in court admitted that they did

nothing to the application. From the evidence it is clear to us that Collings Hui kept the application for about a year without doing anything to it. Collings Hui could easily issue an acceptance letter if they wished to. There is nothing to show that Collings Hui had accepted the offer by the respondent. Being in the employment of Collings Hui the respondent could easily raise the matter of her application with her employer, in our view, the most appropriate person for the respondent to raise the issue was Collings Hui because Collings Hui received the application for about a year without giving any reply.

From the above, it is clear to us that from the conduct of the appellant or their agents, we could not infer or come to the conclusion that the appellant or their agents had accepted the respondent's offer. As such there was no contract whatsoever between the respondent and the appellant in respect of Kiosk No. 3.

The learned judge relied on the authority of *Ayer Hitam Tin Dredging Malaysia Bhd v. Y.C. Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133. We agree with the principles stated in that case and we have no quarrel with what have been stated in that case. Upon examining the evidence, it is clear to us that the learned judge, applying the principle in that case, came to the wrong conclusion. As we have stated earlier, it is clear that there was no acceptance by the appellant or their agent (Natvest) in respect of the application made by the respondent to book Kiosk No. 3. Before leaving the subject, we would like to place our observations in respect of this suit by the respondent. From the evidence, the respondent kept quiet and did nothing after she submitted the application. Collings Hui did nothing to the application but kept it for a year. As soon as Natvest was appointed as agent for the appellant in place of Collings Hui, to be exact five days after the appellant terminated Collings Hui's agency, the respondent started to raise the issue of her application. Collings Hui admitted that things were not right between them and the appellant over the appointment of Natvest. Why the respondent did not raise the issue with Collings Hui earlier is anybody's guess even though her application was submitted a year earlier. Was Collings Hui's termination got to do with her raising the issue? We believe it is so taking into consideration that the person who conducted the projection was commissioned by Collings Hui.

From the reasons we have stated above, we find that the learned judge has erred in coming to the conclusion that there was a contract between the parties in respect of Kiosk No. 3 and the appellant had breached the contract.

Assuming the learned judge was right, what were the damages the respondent had suffered? In this respect the learned judge awarded the sum of RM366,201 as loss of profit and preparatory work. As can be seen from the statement of claim the respondent claimed the sum of RM5,000 as damages for preparatory and the sum of RM1,237,623.75 as damages for loss of profit.

It has been established in *Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275; ([1989] 2 CLJ (Rep) 809) that the onus of proof lies on the party who asserts that it has sustained damage. At p. 280 (p. 814) Wee Chong Jin CJ said:

> We should first set out some legal principles applicable to a case such as this. The fact that an inquiry/assessment of damages has been directed pursuant to an undertaking in an injunction does not raise a presumption that damage has in fact been suffered. The purpose of any such inquiry is to establish: (1) the existence; and (2) the extent of any damage.
>
> If the party concerned has an arguable case for claiming damages, the court would, as a matter of justice, make an order for an inquiry to enable that party to pursue it. The inquiry would of course be at that party's risk as to costs (see *McDonald's Hamburgers Ltd v. Burgerking (UK) Ltd,* a decision of the English Court of Appeal).
>
> The onus of proof lies on the party who asserts that it has sustained damage, and it must be proved that the damage was caused by the injunction (see *Air Express Ltd v. Ansett Transport Industries (Operations) Pty Ltd*, a decision of the High Court of Australia).

In *PT Master Mandiri v. Yamazaki Construction (S) Pte Ltd* [2001] 1 SLR 540, the appellants by an agreement dated 26 November 1998 agreed to buy 24 second hand or used machineries from the respondents for a lump sum of $438,000. Having concluded that contract, the appellants had on 11 December 1998 entered into subcontracts with five others to sell those machineries to them. By a letter dated 14 December 1998, the respondents informed the appellants that they would like to cancel the contract and gave no reason or explanation for the cancellation. The appellant accepted the repudiation and demanded $2.6 million in damages for loss of profits arising from the aborted subcontracts. The respondents did not make any attempt to refund the 50% paid by the appellants to the respondents. In order to resolve the matter amicably the parties negotiated on 24 and 28 December 1998. The respondents informed the appellants that they could only deliver 18 of the 24 machineries since they could not obtain the export permits in respect of the other six machineries. The respondents also informed the appellants that an Indonesian company, PTKG, were also interested in buying the other six machineries for which the export permits could not be obtained, and offered themselves to be

the middleman between the appellants and that Indonesian company. The appellants informed the respondents that they were willing to accept the delivery of the 18 machineries subject to payment of legal costs and expenses, compensation of certain loss in the sub-sales of the machineries and other sums. The respondents were not willing to compensate the appellants for the loss in the sub-sales of the machineries and rejected the proposal. On 27 January 1999, the appellants commenced legal proceedings against the respondents for breach of contract claiming damages. The appellants obtained interlocutory judgment against the respondent. The senior assistant registrar assessed the damages in the sum of S$612,000 for the loss of profits in respect of the 24 machineries after deducting costs for transporting those machineries. Being dissatisfied with that decision the respondents appealed to the judge who found that the appellants had acted unreasonably in rejecting the respondents' offer to deliver the 18 machineries and failed to mitigate their loss in respect of the 18 machineries and as such not entitled to recover the loss. The appellants then appealed to the Court of Appeal where the court held that the question as to what is reasonable for a person to do in mitigating his damages is a question of fact in the circumstances of each particular case. Further, it was held that it is important to evaluate the innocent party's conduct in the light of the circumstances of the particular case, which existed at the material time. So long as the innocent party acts reasonably, he will not be disentitled from recovering the losses incurred as a result of the breach simply on the ground that, with the benefit of hindsight, he could have acted differently.

In *Medicon Plastic Industries Sdn Bhd v. Syarikat Cosa Sdn Bhd* [1995] 3 CLJ 171, VC George JCA at p. 185 said:

> In respect of the special damages claimed, the learned judge pointed out that 'sad to say not one *iota* of evidence was led by the plaintiffs on any part of the items claimed under special damages'. In *Sum Kum v. Devaki Nair & Anor* [1964] MLJ 74 at p. 75, Thomson LP said:
>
> > I would, however, add one observation of a general nature. This is by no means the first appeal this court and its predecessor have had to deal with in which somewhat insufficient attention has been given at the trial to the question of giving adequate evidence on the question of quantum of damages. It is for counsel in such cases to devote a little more attention to that aspect of the matter in future. As Lord Goddard said in the case of *Bonham-Carter v. Hyde Park Hotel, Ltd* [1948] 64 TLR 177 at p. 178:
> >
> > > Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the court, saying" 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

> No attempt or effective attempt had been made to prove the special damages claimed ...

At p. 186 his Lordship said:

> The last head of the claim for general damages was loss of expected profits of RM626,606.92 as aggregated for the three years: 1978, 1979 and 1980. Here again what the plaintiffs did was to throw the figures at the head of the court without proving any of the items that make up the amount. Further, as has been seen, by para 11 of the statement of claim the plaintiffs have stated that the problems with the Alpla were surmounted by August 1978. It follows that if there was loss of profits thereafter it must have been for reasons which have nothing to do with the respondents or their principals. And even for the period up to August 1978, as far as the evidence goes, it was not as if there was no production at all.
>
> Now, what the plaintiffs had relied on were projections made by one Sandanamasamy (who was not called) and Anthony Segamony, PW2, for the years 1978, 1979 and 1980. These projections appear to have been made to support the plaintiffs' application to the bank for credit facilities and which appears to have been made sometime before the plaintiffs decided to invest in the machines. In cross-examination, PW1 the chairman of the plaintiff company, said with reference to the projections:
>
> > The projections were prepared by Anthony Segamony – when he made the projections the company had not secured any contracts for the supply (of) plastic bottles. The projections were made partly for the purposes of bank facilities.
>
> There is no evidence of contracts for the supply of bottles having been entered into, before or after the machines were commissioned or at all. Actual figures in respect of *inter alia* production and sales in 1978 were not divulged to the court. ...
>
> ...
>
> The projections to be worth anything should have been backed by evidence of *inter alia* wages to be incurred eg, employment contracts, costs of materials eg, quotations from suppliers, actual prices at which medical practitioners purchased bottles and so on. In the absence of such evidence or of the like, the basis of the projections and the projections themselves appear to be mere speculation on the part of PW2 and Sandanamasamy. The learned judge was perfectly justified in rejecting them as being mere 'conjecture'.

In *Straits Engineering Contracting Pte Ltd v. Merteks Pte Ltd* [1996] 1 SLR 227, the Court of Appeal in Singapore have the following to say in respect of damages where LP Thean J.A. at pp. 238 and 239 said:

We now come to the third issue, the quantum of damages awarded by the trial judge, which essentially is the principal point of appeal raised by the appellants. The trial judge approached the question of damages as follows:

> The principle to be borne in mind in determining quantum is that damages are to compensate the plaintiff for the breach. As stated in *Engell v. Fitch* [1869] LR 4 QB 659 at p. 666 the basic object of damages is to put the plaintiff 'so far as money can do it, in the same position as if the contract had been performed'. But the damages to be awarded 'should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, parties, at the time they made the contract, as the probable result of the breach of it': *Hadley v. Baxendale* [1854] 9 Exch 341. Damages are based on loss to the plaintiff and not on gain to the defendant: *Tito v. Waddell (No. 2*) [1977] Ch 106.

This approach is undoubtedly correct. The trial judge went on to consider the projected profits given by the respondents and he also examined the evidence of the various witnesses relating to the viability of marine companies. He considered also the profit and loss of the company and the respondents' over the last two years. He was critical of the figures in the projection provided by the respondents and said as follows:

> It seems to me that the figures postulated by Merteks are highly speculative. In coming to that view, I have noted that Teo said he had good business contacts. It was essentially a theoretical exercise, based on inadequate data. There was no proper study or business plan indicating how Merteks intended to expand its business and obtain a bigger share of the market. Neither was there any manpower planning or proper costing. It was based on assumptions though I would accept that for calculations of such a nature, some assumptions may be inevitable.

Having said that the trial judge nonetheless held:

> I accept that on acquiring Nicol & Andrew the capacity of Merteks to undertake repair jobs would be substantially enhanced. I also accept that having a seafront would be a great advantage. ...

He then proceeded to examine the various factors operating for and against the enhancement of the capacity of the respondents by the proposed acquisition, and, immediately following such examination, he said:

> In the circumstances of the case, there can be no doubt that Merteks is entitled to damages for the breach. Straits knew that Merteks was seeking to acquire Nicol & Andrew to expand its business. The problem is in determining the appropriate quantum. I recognize that I could not fairly use the profit margin which Merteks had in fact achieved (without Nicol & Andrew site) in the last few years as a guide without substantial adjustments. Obviously, had Merteks acquired Nicol & Andrew, its capacity would have been greatly enhanced.

> However, while there is some evidence that following the breach, Merteks tried to obtain an alternative seafront site without success, one cannot completely rule out that it could well succeed in the future though this would in turn depend upon numerous factors like the price, the size and location, etc, of the new site. Having considered all the material that is before me, including the factors I have listed above, I am not persuaded that the award in damages in the present case should be based on a straight mathematical calculation as projected by Merteks. That would be grossly excessive. The element of uncertainty is really that much greater in the instant case than say in a case where the court is required to assess the loss of earnings of an individual where we know his past working experience. I am conscious of the remarks of Vaughan Williams LJ in *Chaplin v. Hicks* [1911] 2 KB 786 that '... It may be that the amount (of damages) ... will really be a matter of guesswork. But the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract.' Accordingly, I think the damages I should award here should be more in the nature of compensating Merteks for the loss of a chance or opportunity to make profits rather than that they should be based upon the projected profits stretching over ten years as advanced by Merteks. ... But I think it would not be inordinately low or inordinately high if I were to adopt, bearing in mind the contingencies mentioned, something like 15% of the projected profits of Merteks as the measure of damages.

On that basis he gave judgment for the respondents in the sum of $1,430,000, being approximately 15% of the projected profits.

...

> ... On a close examination of his judgment and looking at it on the totality, we find that the trial judge did not reject for all purposes the profit projections produced by the respondents. He found that the projections were highly speculative and therefore could not adopt them for the purpose of assessing actual loss of profits of the respondents. To award to the respondents loss of profits based on such projections would be grossly excessive. We agree with the trial judge, and do not think that anyone can fault him on that.

Further down at pp. 244 and 245 his Lordship said:

> The trial judge here, doing the best he could in the circumstances, has considered the various factors for and against the respondents and has come to the conclusion that the award of $1,430,000 was a fair and reasonable sum for the loss of the chance that the respondents might make a profit from the acquisition of the company. However, he did not appear to have considered also other relevant factors which, as the appellants before us contended, were not taken into account in the respondents' profit projections. These have been

> mentioned before, and it is unnecessary to repeat them. Suffice it here to say that they ought to have been taken into account, but unfortunately they were not brought to the attention of the trial judge. Having regard to this, we think that in the circumstances a fair and reasonable amount to be awarded to the respondents for the loss of a chance of making a profit would be a sum of $250,000, which is roughly about 2.5% of their projected profits. ...

Having regard to the principles stated above, we are of the view that in order for the respondent to succeed in her claim for damages, she has to satisfy the court that:

(i) she had suffered damages as a result of the breach;

(ii) the actual amount of damages that she had suffered; and

(iii) there were no mitigating factors to reduce the damages suffered by her.

In the present appeal the respondent registered her business (Syarikat Ceritaku) at almost the same time when she made the application. The respondent gave evidence that she made the application to rent Kiosk No. 3 from the appellant in order to make and sell doughnuts. There was no evidence to show that the respondent was in this kind of business before. She admitted that she was the administrative manager of Collings Hui at the material times. She had not shown that she had special knowledge of making and selling doughnuts. From the evidence, it is safe for us to come to the conclusion that the respondent had no experience whatsoever in the business of making and selling doughnuts. The only thing that she did in order to show that she had suffered damages was to present a projection of sale of doughnuts at Subang Parade. The projection paper was prepared by PW3 (Mr. Soosay Anthony). From the evidence, it is clear to us that PW3's experience was only to conduct a general survey but not necessarily confined to making and selling doughnuts. As we have said earlier, PW3 admitted that he was commissioned by Collings Hui and not by the respondent. PW3 also admitted that he was asked by Collings Hui to conduct in respect of a florist, ice-cream and doughnut stalls. PW3 further admitted the survey was conducted by way of observations. We find that the projection proposed by PW3 was not really reliable and satisfactory to show the damages (the would be profit) that the respondent would have suffered. First of all, the survey was done in 1989. Secondly, it was based on the number of people visiting Subang Parade, in particular visiting the Dunkin Donuts stall. It could not be denied that Dunkin Donuts is already an established name. There is no evidence to show that the doughnuts to be made by the respondent would be as good if not better than Dunkin Donuts. It is obvious to us such comparison could not be established because the respondent had not even started the business of making and selling doughnuts yet. To equate the number of people visiting Dunkin Donuts to be the number of

people that would visit the respondent's doughnuts is in our view, unjustified. The competition against the Dunkin Donuts may be disastrous to the respondent. As such the projection by PW3 is not satisfactory at all.

It is clear from the authorities that in order to succeed in claims for damages for loss of profit one must establish the actual losses one would have suffered as a result of the breach. A projection as in this case is not sufficient to establish the would be losses of profit. A venture into a business would not necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear to us that the respondent failed to establish the expected losses as a result of the breach.

The respondent also claimed that she had spent the sum of RM5,000 in preparatory works to start the business. She had not itemised the preparatory works. It is clear to us in a claim such as this the respondent should satisfy the court the actual sums spent for that purpose such as the purchase of furniture and utensils and the hiring of the cook and the workers. The respondent knew from the very beginning that she would not be given Kiosk No. 3 which would no longer exist and she had declined the alternative stall offered to her. For that reason, we believe it is safe for us to come to the conclusion that no preparatory works had been done by the respondent. It would be foolish of her to have the preparatory works done when there was a strong indication that she would not be allotted Kiosk No. 3. It is in evidence that the projection was not commissioned by the respondent but by Collings Hui. If Collings Hui were willing to undertake that job, the cost should be borne by them.

The evidence also shows that the respondent was not willing to mitigate her losses by refusing Natvest's offer of an alternative stall. Natvest had no alternative but to offer the alternative stall due to the fact that Kiosk No. 3 was to be dismantled. If she had accepted the offer her losses (if any) would, in our view, mitigate her losses. For that reason we find that the respondent failed to mitigate her losses.

Taking into consideration the evidence we have enumerated above we find that the respondent failed in her claim for damages for losses of profit. The respondent also failed to mitigate her losses, if any.

For the reasons we have stated above we allowed the appeal by the appellant with costs here and below. The order of the learned trial judge is hereby set aside. The deposit is to be refunded to the appellant.